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No. 03-552

In the Supreme Court of the United States

DON APPLEGATE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Federal Claims erred in determining what constitutes "reasonable attorneys' fees" under a settlement agreement by reference to principles expressed in this Court's fee-shifting cases.

2. Whether the Court of Federal Claims abused its discretion in concluding that the attorneys' fee award should not be subject to an "exceptional results" multiplier.

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-2a) is not published in the *Federal Reporter* but is reprinted in 70 Fed. Appx. 582. The opinion of the Court of Federal Claims (Pet. App. 3a- 49a) is reported at 52 Fed. Cl. 751.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2003. The petition for a writ of certiorari was filed on October 14, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are landowners in Brevard County, Florida, who brought an inverse condemnation action against the United States. They alleged that the government's construction, maintenance, and operation of jetties at Port Canaveral caused erosion of beach holdings south of Cape Canaveral. Pet. App. 4a. The parties settled the action under an agreement in which the United States agreed to pay petitioners $5 million and to provide (contingent on congressional appropriations) beach fill placement in two areas. *Id.* at 6a. The settlement agreement provided that "[t]he United States shall also pay to Plaintiffs attorneys' fees" and that, "[f]or purposes of this Settlement Agreement, Plaintiffs are entitled to recover reasonable attorneys' fees and costs." C.A. App. 365. The agreement provided that if the parties could not agree on the amount of fees and costs, a reasonable amount would be determined by the Court of Federal Claims "following the submission of documentation of said costs and fees." *Id.* at 366.[1]

Following Congress's appropriation of funds necessary for the beach fill project, petitioners filed a motion seeking $1,990,189 in attorneys' fees, along with additional costs and expert fees. Pet. App. 7a. Petitioners later filed an amended motion seeking a much larger fee award. C.A. App. 378-396. In the amended motion, petitioners asserted that they were entitled either to fees

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[1] The settlement agreement does not mention petitioners' private fee agreements with their attorneys. Those contracts provide that, if the litigation is successful, petitioners would pay costs and a fee equal to one-third of the value of the benefits obtained by the suit, or 40% if an appeal is involved, out of their recovery. Pet. App. 4a.

equivalent to 40% of the landowners' monetary and non-monetary benefits, which would generate a fee of more than $12 million, or to fees equivalent to an enhanced lodestar amount, which petitioners calculated to be more than $6 million. *Id.* at 393. The parties were not able to agree on the proper amount of "reasonable" attorneys' fees. After briefing and a two-day evidentiary hearing, the Court of Federal Claims determined that reasonable attorneys' fees amounted to $1,803,575. Pet. App. 4a, 49a.

In reaching its determination, the court rejected petitioners' attempts to analogize the case to a "common fund" case, pointing out that the settlement agreement did not create an identifiable common fund from which fees could be taken, but instead required the United States to pay the fees. Pet. App. 20a-21a. The court accordingly concluded that it was more appropriate to draw on statutory fee-shifting principles, which calculate a "lodestar" amount based on hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Id* at 23a. The court concluded from contemporaneous billing records both the reasonable number of hours petitioners' counsel spent on the matter and reasonable hourly rates, yielding a lodestar of $1,994,277. *Id.* at 29a.

The court reduced the lodestar amount by $190,702 as a result of an earlier sanctions order that barred petitioners from recovering any attorneys' fees for one phase of the litigation. Pet. App. 29a-34a. The court rejected the government's arguments that other reductions should be made to the lodestar to eliminate hours spent on certain unsuccessful arguments and because of inadequate documentation. *Id.* at 34a-41a. The court also rejected petitioners' efforts to enhance the lodestar to compensate for delay in payment and for allegedly

"exceptional results," obtained in the litigation. *Id.* at 41a-49a.

The court of appeals affirmed the judgment without opinion. Pet. App. 1a-2a.

ARGUMENT

The Court of Federal Claims correctly determined the amount of "reasonable" attorneys' fees in accordance with the parties' settlement agreement. The court of appeals' unpublished affirmance of that decision, which interprets and applies the terms of a particular agreement, does not conflict with any decision of this Court or another court of appeals, and it does not present an issue of broad national significance or one that is even likely to recur. This Court's review is not warranted.

1. Petitioners contend that the Court of Federal Claims erred because it allegedly "deemed itself bound by the prohibitions of this Court's statutory fee-shifting jurisprudence, limited itself to a severely restricted lodestar calculation, [and] refused to consider the relevance of Petitioner's contingent fee agreements." Pet. 3. Petitioners are mistaken in their characterization of the lower court's decision.[2]

The Court of Federal Claims explained that it was "evaluating what is 'reasonable' within the meaning of

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[2] There is also no support in the record for petitioners' statement (Pet. 3) that "undisputed testimony and Respondent's admissions established that Petitioners' contingent fee agreements were reasonable." Petitioners simply cite their own appellate briefs in support of that assertion. The petition contains many factual assertions that are based solely on statements in petitioners' appellate briefs. See, *e.g.*, Pet. 3, 8, 9, 10 n.9, 18 n.15, 24 n.16, 25 n.17. The Court has no obligation to credit as true statements that are unsupported by any findings or record evidence.

the Agreement." Pet. App. 8a. It then considered "cases construing * * * fee-shifting provisions, as well as those involving the 'common fund' doctrine * * * to harvest the principles for determining what is a 'reasonable' fee here." *Id.* at 10a. It considered "whether—and to what extent—this case is more appropriately analogized to a statutory fee case, as opposed to a common fund case," *id.* at 19a, and it ultimately determined that "this case is most analogous to a fee shifting matter," *id.* at 21a. The court determined that fee shifting was the appropriate analogy here because the settlement agreement called for fees to be paid by the United States rather than paid out of petitioners' recovery. *Id.* at 22a-23a. The court used principles from statutory fee shifting cases as a guide for determining a "reasonable" fee, noting that this Court has found in such cases that there is a "'strong presumption' that the lodestar represents the 'reasonable fee' promised in most fee-shifting provisions." *Id.* at 26a (quoting *City of Burlington* v. *Dague*, 505 U.S. 557, 562 (1992)).

The Court of Federal Claims plainly did not, as petitioners contend, "hold that this Court's fee-shifting cases are binding upon parties to a settlement agreement that incorporates no fee-shifting statute." See Pet. 11-12. In mischaracterizing the court's decision, petitioners provide no reason to question that court's determination that fee-shifting cases provide the most analogous source of principles for determining a reasonable fee in this case.[3]

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[3] Petitioners ignore a variety of factors, in addition to the source of the fee payment, that support the court's determination to seek guidance from fee-shifting cases. First, had this inverse condemnation suit been litigated to conclusion and petitioners

Petitioners' claims (Pet. 5) of a "conflict" with decisions of this Court and other circuit courts are without substance. Petitioners first contend (Pet. 13-16 & n.14) that *Gisbrecht* v. *Barnhart*, 535 U.S. 789 (2002), requires that a court consider the reasonableness of existing contingent fee agreements. That decision, which petitioners never brought to the attention of the Court of Federal Claims or the court of appeals, is inapposite. The Court in *Gisbrecht* examined the fee agreements because the fee statute at issue "does not authorize the prevailing party to recover fees from the losing party * * * [but] authorizes fees payable from the successful party's recovery." 535 U.S. at 802 (citing Social Security Act § 206(b), 42 U.S.C. 406(b)). *Gisbrecht* plainly does not suggest that a contingent fee arrangement would be pertinent in a situation, like this case, in which the defendant agrees to pay a reasonable fee that will not be taken out of the amount of recovery. Indeed,

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prevailed, fees would have been controlled by a fee-shifting statute —the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4654(c). That fee-shifting statute formed the backdrop for the negotiation of the settlement agreement. Second, the settlement agreement required "the submission of documentation of said costs and fees," C.A. App. 366, which is consistent with a fee award based on hours reasonably expended, rather than on a percentage of recovery. Third, the agreement said nothing suggesting an intent to incorporate the contingent fee agreements petitioners had entered into with their attorneys. Finally, petitioners' initial fee application sought fees in the amount of $1,990,189, reflecting the lodestar approach, rather than a contingent fee. Pet. App. 7a; see *id.* at 29a. Hence, petitioners' own conduct confirms that the parties contemplated use of a lodestar approach—until petitioners filed an amended fee application seeking a dramatically larger award and raising for the first time the theory that an award should be based on the contingent fee contracts.

Gisbrecht supports the Court of Federal Claims' emphasis on the fact that the agreement called for a payment by the United States rather than out of the plaintiffs' recovery in drawing an analogy to fee-shifting statutes.[4]

Petitioners also suggest (Pet. 18-22) that the Court of Federal Claim's decision conflicts with *Wing* v. *Asarco Inc.*, 114 F.3d 986 (9th Cir. 1997), and *Dutchak* v. *Central States, Southeast & Southwest Areas Pension Fund*, 932 F.2d 591 (7th Cir. 1991), because those cases found that the parties' intent, as expressed in attorneys' fee settlement agreements, would prevail over conflicting guidance from case authority stemming from either fee-shifting or common fund contexts. There is no conflict, however, because the court in this case took the same view of the primacy of the contract. See, *e.g.*, Pet. App. 23a n.16 ("[T]he court does *not* rely on the fact that this case would have been controlled by

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[4] This Court has consistently stated that contingent fee contracts should not be considered in the typical fee-shifting situation, stating, for example:

> [W]e have said repeatedly that "[t]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Blum* v. *Stenson*, 465 U.S. 886, 888 (1984). The courts may then adjust this lodestar calculation by other factors. We have never suggested that a different approach is to be followed in cases where the prevailing party and his (or her) attorney have executed a contingent-fee agreement.

Blanchard v. *Bergeron*, 489 U.S. 87, 94 (1989); see *Dague*, 505 U.S. at 565-566 ("we have generally turned away from the contingent-fee model–which would make the fee award a percentage of the value of the relief awarded in the primary action–to the lodestar model") (footnote omitted).

a fee-shifting statute had plaintiffs litigated this matter to completion and prevailed. Rather, the focus here is on the terms of the Agreement."). Moreover, the courts in *Wing* and *Dutchak*, like the court in this case, looked to fee-shifting cases for guidance on what constitutes a "reasonable" fee. See *Wing*, 114 F.3d at 989 (citing two fee-shifting cases, *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), and *Blum* v. *Stenson*, 465 U.S. 886 (1984), in determining that an "exceptional results" multiplier to the lodestar was warranted)); *Dutchak*, 932 F.2d at 596-597 (citing *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), in determining proper lodestar figure).[5]

A trial court has broad discretion in determining what constitutes a "reasonable" attorney fee award, whether under a fee-shifting statute, *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983), or under a settlement agreement that confers that authority on the court. The Court of Federal Claims did not abuse its discretion in determining that the lodestar approach provided a "reasonable" attorneys' fee award for petitioners in this case.

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[5] *Wing* and *Dutchak* permitted the recovery of fees greater than the lodestar amount based on provisions of the particular settlement agreements in those cases that are not present here. In *Wing*, the court of appeals concluded that a fee award equal to twice the lodestar amount was not an abuse of discretion, where the settlement agreement had expressly contemplated a fee award of more than twice the amount of the agreed-upon lodestar figure of $4 million. 114 F.3d at 988. In *Dutchak*, the court of appeals upheld a lodestar multiplier to compensate for the contingent nature of the case, but only because the settlement agreement specifically adopted as guideposts four lower court decisions that had approved contingency multipliers. 932 F.2d at 593 n.1, 595-596. None of these features supporting enhancement of the lodestar were present in the settlement agreement in this case.

2. Petitioners contend (Pet. 22) that even if fee-shifting principles apply, the CFC "used an improper and impossible standard" for determining whether an "exceptional results" multiplier to the lodestar was warranted. In *Dague*, this Court stated that:

> We have established a "strong presumption" that the lodestar represents the "reasonable" fee, *Delaware Valley I, supra*, [478 U.S.] at 565, and have placed upon the fee applicant who seeks more than that the burden of showing that "such an adjustment is *necessary* to the determination of a reasonable fee." *Blum* v. *Stenson*, 465 U.S. 886, 898 (1984).

505 U.S. at 562. In *Blum* v. *Stenson*, 465 U.S. 886 (1994), this Court overturned as an abuse of discretion a fee award that included an "exceptional results" enhancement based upon the complexity of the litigation, the novelty of the issues, the high quality of representation, the great benefit to the class, and the riskiness of the law suit. *Id.* at 898. The Court found that those factors were normally reflected in the number of billable hours claimed and the hourly rates charged. The Court stated that an enhancement to the lodestar could be justified on those grounds "only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" *Id.* at 899.

The Court of Federal Claims applied that standard and, after a comprehensive consideration of petitioners' arguments, concluded that they had not carried their burden of showing that this was one of the "rare" or "exceptional" cases that warrants a multiplier of the lodestar. Pet. App. 44a-49a. In particular, the court

pointed to the facts that: (1) the relief obtained was simply what the complaint sought (and indeed was less than the total asked for); (2) the relief with respect to this project did not affect Corps of Engineers policy generally; (3) the successful resolution of the case was attributable to the substantial efforts of the Florida congressional delegation as well as to the work of plaintiffs and their attorneys; (4) there was no evidence that it was customary in the area for attorneys to charge an additional fee above their hourly rates for an "exceptional" result; and (5) this was not an unattractive case, but one that brought the firm significant positive publicity. *Id.* at 45a-49a.

Petitioners focus on the first of those five factors, contending that the court created a "legal standard for exceptionality" that requires attorneys to obtain relief beyond what the complaint requests. Pet. 24. The court did not, however, elevate that particular consideration to the status of a legal standard. That factor was simply one consideration, among others, that weighed against a finding that petitioners had carried their burden of showing that this was a "rare" case where an enhancement of the lodestar was warranted. The court properly pointed out, for example, that the result here—the rebuilding of a single beach—did not change agency policy or have an impact beyond the confines of the litigation. Pet. App. 46a. The limited nature of the relief distinguishes this case from *Hyatt* v. *Apfel*, 195 F.3d 188 (4th Cir. 1999). The court in that case upheld an enhancement where the litigation had caused the Social Security Administration to promulgate a new nationwide regulation that reversed its past policy and extended the benefits of the suit to "hundreds of thousands of disability claims." *Id.* at 191-192.

The Court of Federal Claims plainly did not abuse its discretion in refusing to award a multiplier in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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